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FEDERAL ELECTION COMMISSION

999 E Street, N.W.
Washington, D.C. 20463

FIRST GENERAL COUNSEL'S REPORT

MUR 6113

DATE COMPLAINT FILED: 10/27/08

DATE OF NOTIFICATION: 11/03/08

LAST RESPONSE RECEIVED: 12/16/08

DATE ACTIVATED: 03/09/09

EXPIRATION OF SOL: 9/26/13-11/04/13

COMPLAINANT:

Frank Long, Chad Cable

RESPONDENTS:

Kirby Hollingsworth

Kirby Hollingsworth for State Representative

RELEVANT STATUTES:

2 U.S.C. § 431(20)(A)(iii)

2 U.S.C. § 433

2 U.S.C. § 434(b)

2 U.S.C. § 434(c)

2 U.S.C. § 434(g)

2 U.S.C. § 441i(f)

2 U.S.C. § 441d(a)

2 U.S.C. § 441d(d)

11 C.F.R. § 100.22

11 C.F.R. § 109.21(g)

11 C.F.R. § 110.11(b)(3)

11 C.F.R. § 300.71

INTERNAL REPORTS CHECKED: None

FEDERAL AGENCIES CHECKED: None

I. INTRODUCTION

The Complaint alleges that Kirby Hollingsworth, a candidate for Texas State representative ("Hollingsworth") and Kirby Hollingsworth for State Representative ("the Committee") (jointly, "Respondents") failed to register with and report to the Commission as a political committee despite sending a mailer and making an expenditure estimated to be "around

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1 \$20,000" to air a radio ad that each advocated the election of John McCain and Sarah Palin for
2 President and Vice President, respectively, and advocated the defeat of Barack Obama in the
3 Presidential election. The Complaint also alleges that Kirby Hollingsworth made expenditures
4 for the public communications at issue from funds that were permitted under Texas state law but
5 which would have been prohibited or excessive under the Federal Election Campaign Act of
6 1971, as amended ("the Act") in violation of 2 U.S.C. § 441i(f). The Complaint further alleges
7 that Respondents violated the Act by failing to report the public communications as independent
8 expenditures and failing to include the proper disclaimers on the public communications. In
9 response to the Complaint, Respondents acknowledge making the communications at issue, but
10 assert that they were not made for the purpose of influencing the presidential election, and ask
11 that the Complaint be dismissed or referred to ADRO.

12 As discussed below, Respondents' radio ad and mailer promote, attack, support or oppose
13 federal candidates and were paid for with funds not subject to the Act's limitations, prohibitions,
14 and reporting requirements. Accordingly, we recommend that the Commission find reason to
15 believe that Respondents violated 2 U.S.C. § 441i(f), which prohibits state and local candidates
16 or officeholders, or their agents, from paying for certain public communications relating to
17 federal candidates unless the funds used are subject to the limitations, prohibitions, and reporting
18 requirements of the Act. With respect to the allegation that the Committee met the Act's
19 political committee status threshold requiring FEC registration and reporting, we recommend
20 that the Commission find no reason to believe that the Committee violated 2 U.S.C. §§ 433 and
21 434. However, we recommend that the Commission find reason to believe that the Committee
22 failed to report independent expenditures and failed to include the proper disclaimers on the
23 mailer and the radio advertisement, in violation of 2 U.S.C. §§ 434(c), 434(g) and 441d. Finally,

we propose a limited investigation into the amounts spent on the public communications at issue, the sources of the contributions Respondents accepted and used for those communications, and the timing of the dissemination of the communications in order to determine the amount in violation.

II. FACTUAL SUMMARY

Hollingsworth was a 2008 candidate for Texas 3rd District Representative in the Texas House of Representatives. Hollingsworth sought through his advertising to link himself in voters' minds with John McCain and Sarah Palin, the 2008 Republican presidential ticket, and to link his opponent, incumbent Mark Homer, with Barack Obama, the 2008 Democratic presidential candidate. As stated in the Response,

The Presidential race between McCain/Palin and Obama/Biden was not competitive ... in the 3rd District of Texas. For the purpose of the State Representative race, however, Mr. Homer's support for Obama, and Hollingsworth's support for McCain/Palin, were perceived by the Committee to be strong campaign issues, so consequently the Committee interjected the issue into advertising in the State Representative race.

Response at 1 (footnote omitted). Respondents commissioned a mailer that attempted to accomplish this goal, which stated in part:

KIRBY HOLLINGSWORTH AND JOHN MCCAIN: Real experience.
Real Solutions. Both Are Ready to Lead. ...
"Northeast Texas is firmly behind John McCain and Sarah Palin – and so am I." -Kirby Hollingsworth ...
Mark Homer urges voters to blindly follow Barack Obama's liberal policies.

See Attachment 1.

The Committee also paid to produce a radio advertisement that emphasized similar themes. As described in the Complaint, the radio ad stated:

1 Do you support Barack Obama for President? Mark Homer does. As reported in
2 the press, Homer told us to be behind Barack Obama. We know Mark Homer is
3 behind Obama, but who's behind Mark Homer? Official records show Homer is
4 funded by lobbyists and Austin special interests.... Kirby Hollingsworth thinks
5 Sarah Palin is the breath of fresh air we need. That's why he proudly endorses the
6 McCain-Palin team. Kirby Hollingsworth for State Representative. The
7 conservative change we need. Political ad paid for [by] Kirby Hollingsworth for
8 State Representative.

9
10 Hollingsworth and the Committee filed a joint response seeking dismissal of the
11 Complaint as a matter of prosecutorial discretion. While denying any intent to impact the federal
12 election, Respondents admit making these public communications, and state that Hollingsworth's
13 opponent's support for Obama was an issue in the local race, and so Hollingsworth attempted to
14 "tie Mr. Homer to Barak [sic] Obama and his 'liberal policies,' and Mr. Hollingsworth to John
15 McCain and his real experience and real solutions." See Response at 1.

16 Respondents' campaign finance disclosure reports to the Texas Ethics Commission
17 indicate payments that appear to be made, in part, for the radio ad and mailer in question,
18 including reported payments of \$500.00 on October 10, 2008 for "production radio ad;" \$20,000
19 on September 26, \$45,000 on October 16, and \$27,000 on October 22, 2008 for "radio/cable
20 buys;" and \$26,472.42 on October 25, 2008 for "Sulphur Springs and Early Voting Auto Dials;
21 Design/Print\n Mailers; Renew postage permit." According to the Response, Respondents pulled
22 the radio advertisement and ceased sending out the mailer when the allegations in the Complaint
23 arose. See Response at 2.

24 **III. LEGAL ANALYSIS**

25 **A. Apparent Violation of 2 U.S.C. 4411(f)**

26 The Act prohibits state and local candidates or officeholders, or their agents, from paying
27 for a communication described in 2 U.S.C. § 431(20)(A)(iii) unless the funds are subject to the

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1 limitations, prohibitions, and reporting requirements of the Act. 2 U.S.C. § 441i(f)(1). Section
2 431(20)(A)(iii) includes public communications that refer to a clearly identified candidate for
3 Federal office and that promote, attack, support, or oppose ("PASO") a candidate for that office,
4 regardless of whether the communication expressly advocates a vote for or against a candidate.
5 As analyzed below, the Hollingsworth mailer and radio ad promote or support John McCain and
6 Sarah Palin (or attack or oppose Barack Obama).

7 A public communication is a communication by means of any broadcast, cable, or
8 satellite communication, newspaper, magazine, outdoor advertising facility, mass mailing, or
9 telephone bank to the general public, or any other form of general public political advertising.
10 See 2 U.S.C. § 431(22); 11 C.F.R. § 100.26. The radio ad appears to have been broadcast, and
11 thus qualifies as a public communication. The Complaint alleges, and the Response does not
12 deny, that the mailer constitutes a mass mailing, defined as a mailing by United States mail of
13 more than 500 pieces of mail matter of an identical or substantially similar nature within any 30-
14 day period,¹ and thus a public communication. See 2 U.S.C. §§ 431(22) and 431(23);
15 11 C.F.R. §§ 100.26 and 100.27.

16 The available information indicates that the Committee's mailer promotes or supports
17 federal candidate John McCain and his running mate Sarah Palin. The first line of the mailer
18 states "KIRBY HOLLINGSWORTH AND JOHN MCCAIN: Real experience. Real Solutions.
19 Both Are Ready to Lead." This statement is a repetition of McCain's presidential campaign
20 slogan "Ready to Lead," and promotes or supports McCain's election as President, both by
21 directly repeating McCain's own campaign theme and by linking the good leadership qualities of
22 "real experience" and "real solutions" with McCain. The quote from Hollingsworth stating

¹ The Committee's disclosed payment of \$26,472.42 for "Sulphur Springs and Early Voting Auto Dials;
Design/Print'n Mailers; Renew postage permit" appears to be consistent with the mailer's status as a mass mailing.

1 "Northeast Texas is firmly behind John McCain and Sarah Palin – and so am I" promotes or
2 supports McCain and Sarah Palin by asserting that voters in the region in which the targeted
3 voters live support the election of McCain and Palin, and it also makes clear that Hollingsworth
4 himself supports the election of McCain and Palin. Further, the mailer's description of Obama's
5 "liberal policies" being "bad for America" attacks or opposes Obama.

6 The language of the radio ad also promotes or supports McCain and Palin. The radio ad
7 states "Hollingsworth thinks Sarah Palin is the breath of fresh air we need. That's why he
8 proudly endorses the McCain-Palin team." Stating that Hollingsworth "proudly endorses" the
9 McCain/Palin team promotes or supports the election of McCain and Palin, and calling Sarah
10 Palin "the breath of fresh air we need" also promotes or supports McCain and Palin.²

11 Because the mailer and the radio ad promoted, attacked, supported, or opposed identified
12 federal candidates, the funds used to pay for these communications should have been only those
13 subject to the reporting requirements and contribution limitations and prohibitions of the Act.
14 See 2 U.S.C. § 441i(f)(1); see also 11 C.F.R. § 300.71.

15 The Committee's reports to the Texas Ethics Commission indicate the receipt of more
16 than \$160,000 in direct and in-kind donations from the Texas Republican Party, \$60,000 in

² The Commission's analysis in Advisory Opinions permitting an endorsement by a federal candidate of a state candidate in that state candidate's advertisements, paid for with non-federal funds, are not relevant to this matter, because the identified federal candidates here did not endorse Hollingsworth. Instead, Hollingsworth endorsed the federal candidates John McCain and Sarah Palin. See Advisory Opinions 2007-34 (Jackson), 2007-21 (Holt), and 2003-25 (Weinzapfel). The first two of these AOs rely in part upon 11 C.F.R. § 109.21(g), the coordinated communications safe harbor for federal candidate endorsements of other candidates. This provision does not address the interplay of Section 441i(f) and the situation that occurs in this case, in which a state candidate attempts to associate him or herself with a popular federal candidate by endorsing the federal candidate. Moreover, the Commission has made clear that exceptions drawn to permit endorsing communications were not intended to permit the PASO of a federal candidate under the rubric of an endorsement of a state candidate. For example, the coordinated communications safe harbor for endorsements and solicitations for non-profits applies *unless* the communication PASOs the endorsing/soliciting candidate or another candidate. See 11 C.F.R. § 109.21(g). In creating that safe harbor, the Commission quoted Senator Feingold in the legislative history as stating that BCRA was not intended to prohibit endorsing communications "so long as those advertisements do not support, attack, promote, or oppose the Federal candidate." Coordinated Communications: Explanation and Justification, 71 Fed. Reg. 33190, 33202 (June 8, 2006) (quoting 148 Cong. Reg. S2143 (March 20, 2002) (Feingold)).

1 donations from Associated Republicans of Texas, a non-profit Texas corporation, and numerous
2 individual donations in excess of the maximum \$2,300 permitted per candidate under the Act
3 during the 2008 cycle. *See* 2 U.S.C. § 441a(a)(1)(A). The Texas Election Code does not limit
4 individual donations to state candidate committees, although the Code prohibits direct corporate
5 donations to candidates and candidate committees. *See* Tex. Elec. Code Ann. § 253.094.

6 Accordingly, the Committee has received funds not subject to the limitations or
7 prohibitions of the Act and not subject to the reporting requirements of the Act. A limited
8 investigation is warranted into the amount of the expenditures for the mailer and the radio ad,
9 and the sources of those funds. Thus, we recommend that the Commission find reason to believe
10 that Kirby Hollingsworth violated 2 U.S.C. § 441i(f).³

11 **B. Political Committee Status**

12
13 The Complaint alleges that the costs associated with Hollingsworth's mailer and the radio
14 ad exceeded the political committee registration thresholds of the Act, and that the Committee
15 failed to register with the Commission as required. *See* 2 U.S.C. § 433. In addition, any political
16 committee required to register with the Commission must file financial reports with the
17 Commission. *See* 2 U.S.C. § 434. The Act defines a "political committee" as any committee,
18 club, association, or other group of persons that receives "contributions" or makes
19 "expenditures" for the purpose of influencing a federal election which aggregate in excess of
20 \$1,000 during a calendar year. 2 U.S.C. § 431(4)(A). To avoid overbreadth concerns, the
21 Supreme Court has held that only organizations whose major purpose is campaign activity can
22 potentially qualify as political committees under the Act. *See, e.g., Buckley v. Valeo*, 424 U.S. 1,

³ The Commission recently dismissed Section 441i(f) allegations in MUR 6019 (Caserta) as a matter of prosecutorial discretion due to the modest amount in potential violation in that matter. Here, it appears that Respondents may have spent tens of thousands of dollars on the communications at issue. *See* p. 4, *supra*.

79 (1976) ("*Buckley*"); *FEC v. Massachusetts Citizens for Life*, 479 U.S. 238, 262 (1986) ("*MCFL*"). The Commission has long applied the Court's major purpose test in determining whether an organization is a "political committee" under the Act, and it interprets that test as limited to organizations whose major purpose is federal campaign activity, a determination that requires a case-by-case analysis of an organization's conduct. See Political Committee Status: Supplemental Explanation and Justification, 72 Fed. Reg. 5595, 5597, 5601 (Feb. 7, 2007); see also *MCFL*, 479 U.S. at 261 n.6, 262 (1986) ("[S]hould *MCFL*'s independent spending become so extensive that the organization's major purpose may be regarded as campaign activity, the corporation would be classified as a political committee.") (citing *Buckley*, 424 U.S. at 79)).

As indicated by the Committee's name, Kirby Hollingsworth for State Representative, the Committee has publicly stated that its purpose or mission was the election of Kirby Hollingsworth to the position of State Representative. The Committee's disclosures to the Texas Ethics Commission indicate that it received donations of more than \$475,000, including more than \$163,000 in in-kind donations from the Republican Party of Texas, and spent more than \$330,000 on expenses related to Kirby Hollingsworth's campaign for State Representative. Of those expenses, it appears that some portion can be linked to the mailer and to the radio ad. The available information indicates that the Committee's major purpose was to promote the candidacy of Kirby Hollingsworth for State Representative and to seek to bring about his election to that position (Hollingsworth lost the State Representative election by 313 votes), not to seek to influence federal campaigns. These facts provide an insufficient basis on which to conclude that the Committee's major purpose was federal campaign activity. Accordingly, we recommend that the Commission find no reason to believe that Kirby Hollingsworth for State

1 Representative violated 2 U.S.C. §§ 433 and 434 by failing to register and report as a political
2 committee.

3 **C. Independent Expenditure Reporting**

4 The term "expenditure" is defined to include "any purchase, payment, distribution, loan,
5 advance, deposit, or gift of money or anything of value, made by any person for the purpose of
6 influencing any election for Federal Office." 2 U.S.C. § 431(9)(A)(i). In determining whether
7 an organization makes an expenditure, the Commission "analyzes whether expenditures for any
8 of an organization's communications made independently of a candidate constitute express
9 advocacy either under 11 C.F.R. § 100.22(a), or the broader definition at 11 C.F.R. § 100.22(b)."
10 See Political Committee Status: Supplemental Explanation and Justification, 72 Fed. Reg. at
11 5606. Under the Commission's regulations, a communication contains express advocacy when it
12 uses phrases such as "vote for the President," "re-elect your Congressman," or "Smith for
13 Congress," or uses campaign slogans or words that in context have no other reasonable meaning
14 than to urge the election or defeat of one or more clearly identified candidates, such as posters,
15 bumper stickers, or advertisements that say, "Nixon's the One," "Carter '76," "Reagan/Bush," or
16 "Mondale!" 11 C.F.R. § 100.22(a); *see also MCFL*, 479 U.S. at 249 ("[The publication]
17 provides in effect an explicit directive: vote for these (named) candidates. The fact that this
18 message is marginally less direct than "Vote for Smith" does not change its essential nature.").

19 The Commission's regulations further provide that express advocacy includes
20 communications containing an "electoral portion" that is "unmistakable, unambiguous, and
21 suggestive of only one meaning" and about which "reasonable minds could not differ as to
22 whether it encourages actions to elect or defeat" a candidate when taken as a whole and with
23 limited reference to external events, such as the proximity to the election. 11 C.F.R. § 100.22(b).

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1 In its discussion of then-newly promulgated section 100.22, the Commission stated that
2 "communications discussing or commenting on a candidate's character, qualifications or
3 accomplishments are considered express advocacy under new section 100.22(b) if, in context,
4 they have no other reasonable meaning than to encourage actions to elect or defeat the candidate
5 in question." *See* 60 Fed. Reg. 35292, 35295 (July 6, 1995).⁴

6 The Hollingsworth mailer and radio ad satisfy the definition of "expressly advocating"
7 under both 11 C.F.R §§ 100.22(a) and 100.22(b), referring to one or more "clearly identified
8 federal candidate(s)" by naming Barack Obama, John McCain, and Sarah Palin in reference to
9 the Presidential election.

10 It appears that both the mailer and the radio ad contain express advocacy under
11 11 C.F.R. § 100.22(a) because they use campaign slogans or individual words that in context can
12 have no reasonable meaning other than to urge the election of McCain/Palin or the defeat of
13 Obama. The first line of the mailer states "KIRBY HOLLINGSWORTH AND JOHN
14 MCCAIN: Real experience. Real Solutions. Both Are Ready to Lead." *See* Attachment 1. This
15 assertion is a repetition of McCain's presidential campaign slogan "Ready to Lead," and so
16 expressly advocates for McCain's election. *See* 11 C.F.R. § 100.22(a). The mailer continues
17 with a quote from Hollingsworth stating "Northeast Texas is firmly behind John McCain and
18 Sarah Palin – and so am I." – *Kirby Hollingsworth*. *See* Attachment 1. This quote expressly

⁴ In *FEC v. Wisconsin Right to Life, Inc.*, 127 S.Ct. 2652 (2007) ("*WRTL*"), the U.S. Supreme Court held that "an ad is the functional equivalent of express advocacy," and thus subject to the ban against corporate funding of electioneering communications, "only if the ad is susceptible of no reasonable interpretation other than as an appeal to vote for or against a specific candidate." *WRTL*, 127 S.Ct. at 2667. Although 11 C.F.R. § 100.22 was not at issue in the matter, the Court's analysis included examining whether the electioneering communication had "indicia of express advocacy" such as the "mention [of] an election, candidacy, political party, or challenger" or whether it "take[s] a position on a candidate's character, qualifications, or fitness for office." *Id.* The Commission subsequently incorporated the principles set forth in the *WRTL* opinion into its regulations governing permissible uses of corporate and labor organization funds for electioneering communications at 11 C.F.R § 114.15. *See* Final Rule on Electioneering Communications, 72 Fed. Reg. 72899, 72914 (Dec. 26, 2007).

1 advocates the election of John McCain specifically as a candidate for President, because being
2 "firmly behind" a candidate expressly advocates for his election, and this language links John
3 McCain with Sarah Palin, who was not a federal office-holder and had no ostensible connection
4 to McCain other than as his vice-presidential running mate.

5 The radio ad even more clearly contains express advocacy under 11 C.F.R. § 100.22(a).

6 The radio ad transcript provided in the Complaint reads as follows:

7 Do you support Barack Obama for President? Mark Homer does. As reported in
8 the press, Homer told us to be behind Barack Obama. We know Mark Homer is
9 behind Obama, but who's behind Mark Homer? Official records show Homer is
10 funded by lobbyists and Austin special interests.... Kirby Hollingsworth thinks
11 Sarah Palin is the breath of fresh air we need. That's why he proudly endorses the
12 McCain-Palin team. Kirby Hollingsworth for State Representative. The
13 conservative change we need. Political ad paid for [by] Kirby Hollingsworth for
14 State Representative.

15
16 The language "Kirby Hollingsworth thinks Sarah Palin is the breath of fresh air we need.
17 That's why he proudly endorses the McCain-Palin team" is a clear endorsement expressly
18 advocating the election of McCain/Palin.

19 It also appears that these communications contain express advocacy within the meaning
20 of 11 C.F.R. § 100.22(b) because the mailer touts McCain's "real experience and real solutions"
21 while denigrating Obama's "liberal policies", and the radio ad praises Sarah Palin as a "breath of
22 fresh air" and links both Palin and McCain to "Conservative change we need," each highlighting
23 character and qualifications. See 11 C.F.R. § 100.22(b). Further, Hollingsworth's ad and mailer
24 are advocating that voters who are voting for McCain/Palin due to their conservatism and
25 qualifications can find those same qualities in Hollingsworth and therefore should vote for him
26 too. Finally, the ad and mailer do not direct the listener/reader to take any action other than

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1 voting. In sum, the ad and mailer are susceptible of no reasonable interpretation other than as an
2 appeal to vote for or against a particular candidate. *See* 11 C.F.R. § 100.22(b).

3 Hollingsworth and the Committee asserted in the response that "[a]t no point did the
4 Committee make any communications for the purpose of influencing the Presidential (or any
5 other Federal) race.... [T]he funds spent by the Committee were specifically -- and only -- for
6 the purpose of influencing the State Representative race in the 3rd District of Texas." Response
7 at 2.

8 Even though the communications included content advocating for the election of Kirby
9 Hollingsworth to non-federal office, the communications also expressly advocated the election of
10 John McCain and Sarah Palin. Importantly, the Commission's regulations do not exempt from
11 the definition of "expressly advocating" in Section 100.22 communications that advocate the
12 election or defeat of a federal candidate while also advocating for the election or defeat of a non-
13 federal candidate, and the subsections of that definition require only *phrases or individual words*
14 that, in context, have no other reasonable meaning, *see* 11 C.F.R. 100.22(a), or an electoral
15 *portion* that is unmistakable, unambiguous, and suggestive of only one meaning, *see* 11 C.F.R.
16 100.22(b). Further, the Supreme Court in *MCFL*, in effect, recognized that a communication
17 could have a non-electoral component and, at the same time, expressly advocate the election or
18 defeat of a federal candidate by holding that a corporation's communication constituted express
19 advocacy, despite the inclusion of issue speech. *See* 479 U.S. at 249-250 (1986); *see also* MUR
20 4313 (Coalition for Good Government) (holding that a corporation's ad that featured candidate

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1 Richard Lugar and included a picture of a bumper sticker that stated "Lugar for President" was
2 express advocacy even though much of the ad concerned an environmental issue).⁵

3 Because the Committee paid for advertisements that appear to contain express advocacy,
4 disbursements for them may qualify as "expenditures" under 2 U.S.C. § 431(9)(A). The
5 Committee's campaign finance reports to the Texas Ethics Commission indicate payments which
6 include the radio ad and mailed campaign literature aggregating over \$119,000.⁶ It thus appears
7 that the Committee made an expenditure in excess of \$1,000 for the radio ad. Further, it appears
8 that an expenditure in excess of \$1,000 may have been made in connection with the mailer.⁷

9 The Act requires that independent expenditures on behalf of a federal candidate, defined
10 as "an expenditure by a person expressly advocating the election or defeat of a clearly identified
11 candidate ... that is not made in concert or cooperation with or at the request or suggestion of
12 such candidate," be reported to the Commission by every person other than a political committee
13 making such independent expenditures in an aggregate amount or value in excess of \$250 during

⁵ In MUR 5974 (New Summit Republicans ("NSR")), a recent express advocacy matter addressing a brochure mailed to Republicans containing a photograph of Hillary Clinton and the phrase "We can beat her if we are united," the Commission could not reach agreement as to whether the NSR brochure expressly advocated the defeat of Hillary Clinton, and voted to dismiss as a matter of prosecutorial discretion in view of the likelihood that the cost of the brochure did not exceed \$3,700. See MUR 5974 Statement of Reasons ("SOR") dated April 14, 2009 (all six Commissioners). See also MUR 5974 SOR dated May 29 and June 2, 2009 (Commissioners Hunter, McGahn and Petersen). In the present matter, the available information suggests that Hollingsworth may have spent tens of thousands of dollars on the communications at issue. In addition, these communications are more clearly express advocacy than the language at issue in MUR 5974. While the language in the NSR brochure did not contain the phrases or language listed in 11 C.F.R. § 100.22(a) and instead contained language similar in nature ("beat her"), Hollingsworth's mailer explicitly repeated a "campaign slogan" of the McCain/Palin campaign, "Ready to Lead." Also, both Hollingsworth communications used specific individual words that "in context can have no other reasonable meaning than to urge the election ... of" the clearly identified federal candidates John McCain and Sarah Palin: the mailer stated that Hollingsworth was "firmly behind" John McCain and Sarah Palin, and the radio ad stated that Hollingsworth "proudly endorses the McCain-Palin team." See 11 C.F.R. § 100.22(a).

⁶ The payment disclosures are lumped together such that the payments of \$20,000, \$45,000, and \$27,000 are labeled "radio/cable buys," which may include cable television ad buys for advertising not the subject of this matter.

⁷ The Committee disclosed a single payment of \$26,472.42 to Ryan Erwin Associates for "Sulphur Springs and Early Voting Auto Dials; Design/Print Mailers/a; Renew postage permit." Additional monthly retainer fees of \$2,000 were paid to Ryan Erwin Associates for several months during the campaign, and some portion of those payments may be allocated to the mailers as well.

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1 a calendar year. See 2 U.S.C. §§ 431(17) and 434(c). As the mailer and the radio ad both appear
2 to expressly advocate the election of John McCain and Sarah Palin, and appear to have cost more
3 than \$250, these communications appear to be independent expenditures that the Committee
4 failed to report in violation of 2 U.S.C. § 434(c).

5 The Act further requires additional independent expenditure reporting within 24 hours of
6 the expenditure when independent expenditures aggregate to \$1,000 or more after the 20th day
7 before the date of an election. See 2 U.S.C. § 434(g). While the dates of dissemination of the
8 mailer and the radio ad were not alleged in the complaint and cannot be determined exactly
9 without investigation, the Committee's disclosures to the Texas Ethics Commission indicate that
10 the Committee made payments of \$45,000 on October 16 and \$27,000 on October 22, 2008 for
11 "radio/cable buys," and a payment of \$26,472.42 on October 25, 2008 to Ryan Erwin Associates
12 identified as "Sulphur Springs and Early Voting Auto Dials; Design/Print\n Mailers; Renew
13 postage permit," which were all made within 20 days of the November 4, 2008 election. Given
14 the dates of these payments, it is likely that the Committee spent more than \$1,000 on
15 communications disseminated within 20 days of the election, and therefore the Committee may
16 have violated 2 U.S.C. § 434(g). Accordingly, we recommend that the Commission find reason
17 to believe that the Kirby Hollingsworth for State Representative Committee violated 2 U.S.C.
18 §§ 434(c) and 434(g). An investigation into this matter can seek information regarding the dates
19 on which the mailer and the radio ad were disseminated to confirm whether the dissemination
20 dates were within 20 days of the November 4, 2008 election.

21 **D. Disclaimers**

22 As the mailer and the radio ad appear to expressly advocate for the election of John
23 McCain and Sarah Palin, the Committee was required to place federally compliant disclaimers

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1 on them. *See* 2 U.S.C. § 441d(a)(3). Such a disclaimer would require the name, permanent
2 street address, and telephone number or WWW address of the Committee and state that the
3 communication was not authorized by any federal candidate or candidate's committee.

4 While the disclaimer on the outside of the mailer includes the name and address of the
5 entity paying for the mailer, it fails to state that the mailer was not authorized by any federal
6 candidate or any federal candidate's authorized committee. *See* 2 U.S.C. § 441d(a)(3); 11 C.F.R.
7 § 110.11(b)(3). Second, while the mailer includes the Committee's name and address, it does
8 not include a telephone number or WWW address, nor is it boxed and set apart from the rest of
9 the ad. *See* 2 U.S.C. § 441d(a)(3) and (c)(2).

10 For the radio ad, the requirement of 2 U.S.C. § 441d(d)(2) is not fulfilled, in that the
11 audio statement "_____ is responsible for the content of this advertising" was not part
12 of the ad. Also, the radio ad did not include the street address, telephone number, or WWW
13 address of the Committee, nor did it state that the ad was not authorized by any federal candidate
14 or any federal candidate's authorized committee. *See* 2 U.S.C. § 441d(a)(3);
15 11 C.F.R. § 110.11(b)(3). Accordingly, we recommend that the Commission find reason to
16 believe that Kirby Hollingsworth for State Representative violated 2 U.S.C. § 441d.

17 **IV. PROPOSED INVESTIGATION**

18 A limited investigation is necessary to determine how much money was spent on the
19 mailer and the radio advertisement and the dates of dissemination of the mailer and the radio ad
20 in order to ascertain whether impermissible funds were spent on the communications and if so,
21 how much, as well as to determine whether independent expenditure reporting was required
22 under both 2 U.S.C. § 434(c) and (g). _____
23 _____

V. RECOMMENDATIONS

1. Find reason to believe that Kirby Hollingsworth violated 2 U.S.C. § 441i(f).
 2. Find no reason to believe that Kirby Hollingsworth for State Representative violated 2 U.S.C. §§ 433 or 434 by failing to register and report as a political committee.
 3. Find reason to believe that Kirby Hollingsworth for State Representative failed to report independent expenditures in violation of 2 U.S.C. §§ 434(c) and 434(g).
 4. Find reason to believe that Kirby Hollingsworth for State Representative violated 2 U.S.C. § 441d by failing to include proper disclaimers on its mailer and its radio advertisement.
-
6. Approve the attached Factual and Legal Analysis.
 7. Approve the appropriate letters.

Date

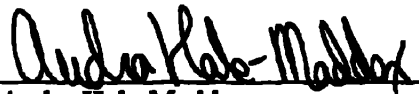
7/2/09

Thomasenia P. Duncan
Thomasenia P. Duncan
General Counsel

Ann Marie Terzaken
Ann Marie Terzaken
Associate General Counsel for Enforcement



Mark Allen
Assistant General Counsel



Audra Hale-Maddox
Attorney

Attachments:

1. Hollingsworth Mailer

29044253977

KIRBY HOLLINGSWORTH AND JOHN MCCAIN

"Northeast Texas
is firmly behind
John McCain
and Sarah Palin-
and so am I."

- Kirby Hollingsworth

Pol. Adv. Kirby Hollingsworth
for State Representative
POBOX41
Mount Vernon, TX 75457-0041

FRONT STD US
POSTAGE PAID
CLEARVISIONS
INC.

Kirby Hollingsworth
Your conservative choice for
State Representative



Mark Homer urges voters to blindly
follow Barack Obama's liberal policies.

Mark Homer "urged Democrats to unite behind whoever is chosen as the party's presidential candidate."¹

This is not leadership.

Northeast Texas deserves a leader... not a follower.

Mark Homer's blind support for Barack Obama shows that he puts his party first, over Northeast Texas... no mater what!!!

Barack Obama's liberal policies are bad for America... And Mark Homer's blind support for these policies are bad for Texas.

He's ~~not~~ for Texas.

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